(29)

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944.

No. 761

JAMES GALLAGHER,

Petitioner,

vs.

JOSEPH E. RAGEN, WARDEN, JOLIET BRANCH, ILLINOIS STATE PENITENTIARY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

PETITION FOR WRIT OF CERTIORARI AND AUTHORITIES IN SUPPORT THEREOF.

CHARLES LIEBMAN,
29 S. LaSalle St.,
Chicago, Illinois,
Attorney for Petitioner.

Midwest Law Printing Co., 340 W. Huron St., Chicago

INDEX.

AUTHORITIES CITED.

STATUTES.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944.

No.

JAMES GALLAGHER,

Petitioner,

VS.

JOSEPH E. RAGEN, WARDEN, JOLIET BRANCH, ILLINOIS STATE PENITENTIARY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

PETITION FOR WRIT OF CERTIORARI AND AUTHORITIES IN SUPPORT THEREOF.

To the Honorable the Chief Justice and the Associate Justices of the United States Supreme Court:

PETITION FOR WRIT OF CERTIORARI.

This is a petition for writ of certiorari to the Supreme Court of Illinois, to review an order denying relief from imprisonment on habeas corpus.

I. The Facts.

The petition for habeas corpus, consisting of 54 pages, was filed in the Supreme Court of Illinois on September 18, 1944, and was denied without opinion the next day, and shows that the petitioner, James Gallagher, has been incarcerated in the Illinois State Penitentiary at Joliet, Illinois, continuously since March 26, 1919, serving an indeterminate sentence to imprisonment of from one year to life, imposed by the Criminal Court of Cook County, Illinois, for the crime of armed robbery. The petition shows further that the Illinois Parole Board considered petitioner's case on September 4, 1939. A complete transcript of the proceedings before the Parole Board is included in the petition (Rec. 4-12). At the conclusion of such hearing, an order was entered by the Parole Board setting a "final date" of March 26, 1949, which order would, if it had been conformed to, have entitled petitioner to discharge on parole *as of right* on May 10, 1939, by virtue of the "Good Time" statute of the State of Illinois (Ch. 108 Ill. Rev. Stats. 1943, § 45) and the progressive merit system in operation in the prison, pursuant to such statute, since petitioner is entitled to the benefits of the said statute and the said progressive merit system by virtue of his being classified as a Grade A prisoner (Rec. 13).

Petitioner, however, was not released in 1939, but, instead was again called before the Parole Board on September 29, 1939, and was again interviewed. A stenographic transcript of this interview is included in the petition (Rec. 15-21). Following this interview, the hope of liberty was again dangled before petitioner's eyes, and he was told in effect to come back in fifteen months and he would be again considered. He did come back and was again put off for two years, after another inter-

view, the transcript of which is incorporated in the petition (Rec. 25-32). Upon the occasion of the next interview after this latter one, January 6, 1943, the Parole Board (or rather its successor, the Division of Correction of the Department of Public Safety, which took over all the functions of the Parole Board in the interim), consideration of petitioner's case was continued until March 26, 1957. (Petitioner would then be 74 years old.) Petitioner then filed a petition for a writ of habeas corpus, substantially identical to the one filed in this case, in the Criminal Court of Cook County, Illinois, and relief was denied on May 9, 1944. The present petition was filed on September 18, 1944, in the Supreme Court of Illinois, and an order was entered on September 19, 1944, denying the petition (Rec. 55).

II. Statement As to Jurisdiction of This Court.

This Court has jurisdiction to hear this case because it involves several questions of denial of due process of law and of the equal protection of the laws in violation of the 14th Amendment to the Constitution of the United States, as will be more fully explained hereinafter. No question other than these Constitutional questions is raised by the petition, or appears anywhere in the case.

III. Contentions of Petitioner.

The petitioner contends that the State of Illinois has denied him due process of law and the equal protection of the laws, and that his present incarceration is continued as a result of such denial of due process of law and the equal protection of the laws in the following respects:

A. The Orders of the Parole Board Denying Release to Petitioner Are So Arbitrary As to Shock the Sense of Fundamental Fairness in That They Bear Absolutely No Logical Relationship to the Matters Adduced By the Board, Their "Hearing" Being in Effect Mere Kangaroo Courts.

It appears that in the first hearing before the Parole Board, the decision to release petitioner from the penitentiary in 1939 was based upon a full consideration of the facts, the strong recommendation of the mental health officer that he be released (Rec. 11) and the classification of petitioner by the Actuary into a class where there was at least a 72% chance of his not returning to prison. This decision was sustained by the evidence—indeed, a careful reading of the transcript (Rec. 4-12) can lead to no other conclusion than that petitioner's detention should have been terminated. The decision should be taken to be correct, unless some other evidence were adduced in the future.

No further evidence was adduced, and each subsequent decision of the Parole Board appears, upon the most casual reading of the transcript of proceedings on which they purport to base their decisions, to be arbitrary and capricious, and utterly without reasonable basis. This Court has repeatedly held that in a proceeding where human liberty is at stake, there must be some relevant evidence considered, and the decision taking away liberty must bear a reasonable relationship to that evidence. In *Tot* v. *United States*, 319 U. S. 463, 63 S. Ct. 1241, 87 L. Ed. 1519, it is said: "Where guilt is in issue, a verdict against the defendant *must* be predicated upon *some evidence* which tends to prove the elements of the crime charged," and in *De Jonge* v. *Oregon*, 299 U. S. 353, 361, 57 S. Ct. 255, 81 L. Ed. 278, "Conviction upon a charge

not made would be a sheer denial of due process." We believe that these cases are highly relevant to a proper disposition of the case at bar. While we have found no cases passing upon the degree of capriciousness in which a State Parole Board may indulge without running afoul of the safeguards of personal liberty contained in the 14th Amendment, there are numerous cases where the actions of other state administrative bodies have been held to be so arbitrary as to deny due process of law, and this Court has spoken to correct the injustice done. *Morgan* v. *United States*, 304 U. S. 1, 58 S. Ct. 773, 82 L. Ed. 1129; *Douglas* v. *Noble*, 261 U. S. 165, 43 S. Ct. 303, 67 L. Ed. 590.

The petitioner is now an old man, 61 years of age. If he should live until 1957 he would be 74 years old when his case is again considered by the Parole Board. This, in effect, amounts to "throwing the key away," where a man has already served a quarter of a century for a crime, and is of the class which experts believe will, in all probability, be a useful citizen upon his return to society. The key should not be thrown away in such a situation as this unless there appears to be good reason for doing so. The Parole Board had no such reason, and on the contrary had every reason to believe that petitioner should have been discharged.

We respectfully direct the Court's attention to the fact that the indeterminate sentence of imprisonment of from one year to life is the only sentence which an Illinois court may impose for the crime of armed robbery (Ch. 38 Ill. Rev. Stats. 1943, § 501), and that armed robbery is the only crime for which such a sentence may be imposed in Illinois. Whether the crime be the robbery of a loaf of bread by a starving pauper or the most vicious

of bank robberies, the sentence is the same. This feature of Illinois criminal jurisprudence vests the widest possible discretion in the Parole Board. Any other inmate of the Illinois Penitentiary, with the exception of persons serving determinate sentences to life imprisonment imposed by the courts under Ch. 38 Ill. Rev. Stats 1943, § 801, for the crimes of murder, rape, or kidnapping for ransom, will eventually be released by expiration of sentence, although the Parole Board may, in its discretion, hasten the date of such release. This responsibility should not be taken lightly. A man who robs a grocer of a loaf of bread may, if we are incorrect, be condemned by administrative caprice to serve the rest of his life in prison. Such a thing is shocking to the 20th Century sense of "fundamental conceptions of justice which lie at the base of our civil and political institutions" (*Hebert* v. *Louisiana*, 272 U. S. 312, 316, 317; *Mooney* v. *Holohan*, 294 U. S. 103, 112, 55 S. Ct. 340, 79 L. Ed. 1331).

The conclusion is inescapable that the Parole Board must be held to a high standard of reasonableness in dealing with cases, and that in this case, it has abused its discretion in such a manner that the courts must give a remedy to protect against a reversion to mediaeval barbarity in the criminology of this nation. Illinois has denied James Gallagher a remedy, and he now respectfully seeks redress in the only tribunal open to him.

B. The Orders of the Parole Board Entered in 1939, 1941 and 1943 Each Deprive Petitioner of His Liberty Without Due Process of Law and Deny Him the Equal Protection of the Laws in That They Take Away a Vested Right.

Under Illinois law, the allowance given to a prisoner for good behavior in the penitentiary, known as the "good

time'' allowance, cannot be taken from the prisoner without due notice and hearing, and the question of whether or not it has been is a proper subject for judicial review. *People ex rel. Day* v. *Lewis,* 376 Ill. 509, 34 N. E. (2d) 712, 713. The question of whether continuance of the prisoner's case by the Division of Correction, after the Parole Board has set a final release date takes away this right without due process of law has been squarely passed upon and decided in favor of the petitioner in the case of *United States ex rel. Foley* v. *Ragen,* 52 Fed. Supp. 265. In a subsequent phase of the same case in the 7th Circuit Court of Appeals, 143 Fed. (2d) 774, reversed the trial court's order of discharge, holding there was no jurisdiction for the District Court to hear the case, since the petitioner there had not exhausted the remedies available to him in the state courts, and then expressed an opinion, *obiter dictum,* on the merits of the case, which opinion was contrary to the result reached by the trial court. This expression of the opinion of the Court was not a part of the *ratio decidendi,* and should not be considered as stating the law.

This Court has never passed upon the question thus presented.

We submit that in ordering the continuance of petitioner's incarceration as it has done, the Parole Board has, in effect, annulled petitioner's right to the good time allowance. We have shown heretofore that the orders doing this were not entered in accordance with the requirements of due process of law.

The Illinois Supreme Court has not adequately considered the issues presented by this case, and has lent its stamp of approval to the unconstitutional acts herein complained of.

Wherefore petitioner prays that a writ of certiorari be issued out of this Court, bringing the record in this proceeding before the Supreme Court of Illinois before this Court for consideration.

Respectfully submitted,

JAMES GALLAGHER,
Petitioner.

By CHARLES LIEBMAN,
His Attorney.

(30)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 761

JAMES GALLAGHER,
Petitioner,

vs.

JOSEPH E. RAGEN, WARDEN, JOLIET BRANCH, ILLINOIS STATE PENITENTIARY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

GEORGE F. BARRETT,
Attorney General of the State of Illinois,
Attorney for Respondent.

WILLIAM C. WINES,
Assistant Attorney General,
Of Counsel.

THE BUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1944.

No. .....

JAMES GALLAGHER,
Petitioner,

vs.

JOSEPH E. RAGEN, WARDEN, JOLIET BRANCH, ILLINOIS STATE PENITENTIARY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

THE QUESTION PRESENTED.

The question presented is whether the failure of the Illinois Parole Board to recommend parole or commutation of sentence of petitioner involved the denial of any right which is within the purview of the Fourteenth Amendment.

ARGUMENT.

I.

Petitioner has not been deprived of any federal constitutional right by the proceedings or actions of which he complains.

Petitioner seriously misconceives the intent, effect and logic of Illinois' parole laws. In Illinois parole laws have been held valid upon the theory expressed in the laws themselves that the sentence imposed by the court is for the maximum period of confinement authorized by the statute defining and punishing the crime, with the following proviso:

> "* * * it shall be deemed and taken as a part of every sentence, as fully as though written therein, that the Division of Correction, by and with the approval of the Governor **in the nature of a release or commutation of sentence or commitment,** may terminate the term of such imprisonment or commitment earlier than the maximum fixed by the court, as provided in Section 9." (Ill. Rev. Stats. 1943, Ch. 38, sec. 802.)

(Section 9 above referred to authorizes indeterminate sentences in certain crimes, including that of which petitioner was convicted. Id. sec. 801.)

The Supreme Court of Illinois has held this and former similar statutes invulnerable to attack upon the ground that it offends Illinois' constitutional distribution of powers because, as the Supreme Court of Illinois has consistently held, the sentence is for a definite term which is the maximum term provided by law less, of course, *statutory* time off for good behaviour. In effect, all that the Illinois parole law does is to provide a definite rather than an indefinite

sentence for all of the crimes to which it is applicable and to set up administrative machinery for the purpose *merely of advising the Governor*, so that he may exercise his constitutional (not statutory) power of pardoning, the statute being implemented by provisions for the supervision of prisoners whose commutation is conditional upon their good behavior while on parole, making of reports, and the like.

In other words, the statute creates no right either to parole or to release without parole before the expiration of the maximum term provided by the statute. It authorizes, but does not require, commutation of sentence; but it creates no right to such commutation.

Petitioner's brief fails to make it clear to the court that there are three ways in which a prisoner in Illinois sentenced, let us say, for a maximum term of ten years, can lawfully be given his physical liberty (a term which we use advisedly in place of the term "discharge") in less than ten actual calendar years. The first of these three ways is by earning *statutory* time off for good behavior. While the prison authorities do have discretion to determine whether the prisoner has behaved well, if they in fact do determine that he has behaved well, they have no discretion to deny him the *statutory* time for good behaviour. Since their discretion is limited to finding the presence or absence of the statutory *factual* prerequisite to discretion of time of servitude, which prerequisite is good behaviour, they are bound to exercise that discretion reasonably and not arbitrarily.

The other two ways are discharged by the Governor without parole upon recommendation of the Parole Board or parole by the Governor, likewise upon recommendation of the Parole Board.

Parole or discharge without parole before the prisoner

has served the maximum sentence with *statutory* time off for good behaviour, if he has earned it, is not a matter of right with the prisoner. It is purely a matter of the Governor's grace and clemency. Paroles and discharges for less than the service of the maximum time, with time off for good behaviour if such time is earned, are exercises of the Governor's constitutional power to pardon or commute. The function of the Parole Board in recommending such discharges is to purely that of informing and advising the Governor's discretion. There is no right of the prisoner involved. The legislature has not commanded and presumably could not command the Governor to exercise his power of pardon, even in a case that was clearly proper.

Petitioner has sought to clothe with the vestments of a constitutional right what is at most a hope or wish that clemency may be shown him. If the right existed, it would, of course, be attended with the important procedural rights of notice, opportunity to be heard, and finding of facts on at least some evidence, with the further requirement that the discretion, even though broad, must be reasonably exercised. But there is no constitutional right to a pardon or commutation in the nature of a pardon. No right being involved, there is nothing that can be confiscated without due process of law.

It is the position of respondent in this case that the subject matter of petitioner's claim is not within the protection of the Fourteenth Amendment and that therefore there can be no inquiry as to the reasonable or unreasonable character of the refusal of the parole board to recommend what is in effect a pardon.

The case of *People* v. *Lewis*, 376 Ill. 509, cited by petitioner, is in effect strongly adverse to him and his teachings. The court's holding applies to *statutory* good time. As we have pointed out, a prisoner who has behaved well is per-

emptorily entitled to time off for good behaviour. While discretion exists with respect to finding whether he has behaved well, once that fact is found, no discretion exists with respect to whether he shall be discharged. Nevertheless, the opinion explains fully the theory of the Illinois Parole act and makes it clear, although perhaps only by *dicta* and inference, that the right to discharge upon parole or otherwise is, except with respect to statutory good time, a matter of grace and not of right. There being no right, no right has been or could be confiscated.

Conclusion.

For the reasons urged in the foregoing Argument, it is respectfully submitted that no statutory federal question is involved and that the writ of *certiorari* should be denied in this case.

Respectfully submitted,

GEORGE F. BARRETT,
Attorney General of the State of Illinois,
Attorney for Respondent.

WILLIAM C. WINES,
Assistant Attorney General,
Of Counsel.